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E. ROBERT SEAVER, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 322

JURIS. STATEMENT NOT PRINTED

JOSEPH McKEIVER
and
EDWARD TERRY,

Appellants,

v.

PENNSYLVANIA,

Appellee.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the Supreme Court of Pennsylvania is reported at 438 Pa. 339, 265 A.2d 350 (1970).

JURISDICTION

On May 4, 1970, the Supreme Court of Pennsylvania filed an opinion and order sustaining the validity of Section 5 of the Pennsylvania Juvenile Court Law against appellants' claim of repugnancy to the United States Constitu-

tion. On May 28, 1970, appellants filed and served notices of appeal to this Court. On June 29, 1970, this Court noted probable jurisdiction over the appeal. (A. 48) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2) (1964).

QUESTION PRESENTED

Is the provision of the Pennsylvania Juvenile Court Law prohibiting jury trials in juvenile delinquency proceedings void for repugnancy to the sixth and fourteenth amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The sixth amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The first section of the fourteenth amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

> property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 of the Pennsylvania Juvenile Court Law, Act of June 2, 1933, [1933] Pa. Stat. 1433, Pa. Stat. Ann. tit. 11, § 247 (1965) provides:

> Except as hereinafter provided, the court shall hear and determine all cases affecting children arising under the provisions of this act without a jury. If an adult coming before the court is charged with an offense for which he is entitled to a trial by jury, and if he so demand, the case shall be returned by the judge of the court to the proper court for trial.

STATEMENT

JOSEPH McKEIVER

On October 17, 1968, Joseph McKeiver, age fifteen, appeared for the first time before the Family Division of the Court of Common Pleas of Philadelphia,[1] charged with the felonies of robbery, larceny and receiving stolen goods as acts of juvenile delinquency. Pa. Stat. Ann. tit. 18, §§ 4704, 4807, 4817 (1963). Appellant moved for a jury trial on federal constitutional grounds, but the motion was denied. Appellant was then tried without a jury. The evidence consisted solely of the testimony of the alleged robbery victims, two teenage boys about the same ages as appellant. Their testimony tended to show that twenty-five

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[1] In considering the record in this appeal it should be noted that the jurisdiction provided for by the Pennsylvania Juvenile Court Law was originally exercised by the judges of the County Court of Philadelphia. By constitutional amendment, effective January 1, 1969, the trial courts of Pennsylvania were consolidated into one Common Pleas Court and the Juvenile Court jurisdiction is now exercised by the judges of the Family Division of the Court of Common Pleas. *Pa. Const.*, art. V, § 5 and Schedule to art. V, § 16.

cents was taken by a boy whom the witnesses subsequently identified as appellant. The testimony had inconsistencies and, on that account, was described by the court below as "weak." 438 Pa. at 341 n.1, 265 A.2d at 351. The case was the kind that would have profited from the healthy skepticism of a jury. Appellant was convicted by the court.

On November 7, 1968, appellant filed a timely petition for rehearing on the ground, *inter alia*, that the court had violated appellant's rights under the Due Process clause of the fourteenth amendment by denying him a jury trial. After briefs and oral argument, the court entered an order on February 13, 1969, denying appellant's petition. An appeal was taken to the Superior Court of Pennsylvania, which, on August 7, 1969, entered a per curiam order, without opinion, affirming the court below. An appeal, consolidated with that of Edward Terry, was taken from the order of the Superior Court to the Supreme Court of Pennsylvania, which, on May 4, 1970, in a single opinion, affirmed the orders of the Superior Court.

EDWARD TERRY

On January 20, 1969, Edward Terry, age fifteen, appeared before the Family Division of the Court of Common Pleas of Philadelphia (Juvenile Court), charged with assault and battery on a police officer and conspiracy as acts of juvenile delinquency.[2] Appellant moved for a jury trial, but the motion was not ruled upon and the case was several times continued, ultimately to March 27, 1969. On that date, appellant renewed his motion for a jury trial, but the motion was denied.

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[2]Under Pennsylvania law, assault and battery and conspiracy are each misdemeanors punishable by imprisonment up to two years. *Pa. Stat. Ann.* tit. 18, §§ 4708, 4302 (1963)

The evidence tended to show that appellant was one of a group of boys watching two small boys fighting. A police officer happened upon the rumpus, stopped the fight, and ordered the onlookers to disperse. The testimony of the arresting officer and that of an eyewitness conflicted as to what happened, but in any event, there was at least some "wrestling" between appellant Terry and the arresting officer which resulted in Terry's being arrested by the officer on the following day. A jury might have resolved the testimonial conflict in appellant's favor, but the court found appellant guilty and ordered him incarcerated in a state correctional institution. An appeal was taken from that order to the Superior Court of Pennsylvania, which entered, on August 7, 1969, a per curiam order, without opinion, affirming the court below. An appeal, consolidated with that of Joseph McKeiver, was taken from the order of the Superior Court to the Supreme Court of Pennsylvania, which, on May 4, 1970, in a single opinion, affirmed the orders of the Superior Court.

SUMMARY OF THE ARGUMENT

In *In re Gault*, 387 U.S. 1 (1967), this Court subjected the adjudicatory phase of juvenile delinquency proceedings to the requirements of due process, holding that due process required at least that juveniles be given adequate notice of the charges against them, be represented by counsel, be afforded the fifth amendment rights against self-incrimination, and be granted the rights of confrontation and cross-examination. The Court indicated that due process might require additional safeguards in juvenile delinquency proceedings. Thus, in *In re Winship*, 397 U.S. 358 (1970), the Court held that due process requires that the standard for adjudication of delinquency for violations of the criminal law be proof beyond a reasonable doubt.

The process by which juveniles are adjudicated delinquents is substantially similar to the adult criminal pro-

cess: a child is charged with crime, tried under the same basic rules used in the adult criminal process, and, if convicted, stigmatized like an adult criminal and imprisoned in institutions as bad as or worse than a prison for adult criminals. The juvenile court prosecutor and judge play the same role as they do in an adult criminal court. Jury trials are therefore essential to protect juveniles from the "corrupt or overzealous prosecutor" and the "compliant, biased, or eccentric judge", which protection was basic to this Court's holding in *Duncan v. Louisiana*, 391 U.S. 145 (1968), that the right to jury trial was essential to fundamental fairness in state criminal prosecutions for serious offenses and therefore required by due process. Indeed, trial by jury may be more essential to fundamental fairness in juvenile court proceedings because of the greater discretion in the juvenile system as to when to arrest, when to prosecute, and the severity of the penalty to impose.

The attributes of a jury make it a more accurate factfinder and less likely to convict where there is reasonable doubt than a single judge. Trial by jury is therefore necessary to afford that high degree of protection against conviction of the innocent which this Court found essential to fundamental fairness in juvenile delinquency proceedings in *In re Winship*, 397 U.S. 358 (1970).

The process by which juvenile delinquency is adjudicated and dealt with is a system in which juveniles are charged with crime, are tried in the same type of factfinding process as adult criminals, and are liable upon conviction to incarceration in correctional institutions as bad as or worse than adult prisons. This brings juvenile delinquency proceedings—whether or not their goal is rehabilitation—within the ambit of the "criminal prosecutions" for which the sixth amendment guarantees the right to trial by jury.

Should the importance of jury trials to fundamental fairness be balanced against the rehabilitative purpose of the juvenile court, the clear demonstration required that jury trials would interfere with rehabilitation cannot be made.

Rehabilitation is not attempted and does not occur during the adjudicatory hearing—the factfinding phase of the juvenile court process. Therefore, jury trials—which affect only the adjudicatory hearing—cannot adversely affect rehabilitation. Moreover, the juvenile court's goal of rehabilitation, which *Gault* requires to be judged in terms of accomplishments rather than promises or hopes, has not been achieved. Finally, the experience in jurisdictions statutorily granting the right to trial by jury indicates that the right will not impose a significant burden upon juvenile courts nor delay adjudication adversely to rehabilitation.

ARGUMENT

I. JURY TRIALS ARE ESSENTIAL TO FUNDAMENTAL FAIRNESS IN JUVENILE DELINQUENCY PROCEEDINGS.

In *In re Gault*, 387 U.S. 1 (1967), this Court subjected the adjudicatory phase of juvenile delinquency proceedings to the requirements of due process, holding that due process required at least that juveniles be given adequate notice of the charges against them, be represented by counsel, be afforded the fifth amendment right against self-incrimination, and be granted the rights of confrontation and cross-examination. The Court indicated in *Gault* that due process might require additional safeguards in juvenile delinquency proceedings, but left elaboration of those requirements to a case by case determination of whether the asserted requirement was fundamental to fairness in juvenile delinquency proceedings. Thus, in *In re Winship*, 397 U.S. 358 (1970), the Court held that due process requires that the standard of proof for adjudication of delinquency for violations of the criminal law be proof beyond a reasonable doubt of every fact constituting the crime charged.

In *DeBacker v. Brainard*, 396 U.S. 28 (1969), the Court did not reach the question—which this appeal presents—of the right of juveniles to trial by jury, but Justices Douglas

and Black, dissenting, stated their view that due process requires that juveniles be afforded the right to trial by jury. 396 U.S. at 33-38. The present appeal differs from *DeBacker* in that both appellants were tried after May 20, 1968, the date of the Court's holding in *Duncan v. Louisiana*, 391 U.S. 145 (1968), that the right to a jury trial for serious offenses is fundamental to a fair trial in adult criminal proceedings. Appellants submit that a jury trial is fundamental to a fair trial in juvenile delinquency proceedings and therefore required by due process.

Appellants were tried in delinquency proceedings typical of those afforded by most of the states[3] and substantially similar to a criminal trial. Delinquency proceedings against juveniles are initiated by a petition charging a violation of the Penal Code in the conclusory language of an indictment.[4] A juvenile who is detained prior to trial is held in a building substantially similar to an adult prison. Indeed, juveniles over sixteen in Philadelphia *are* held in the cells of an adult prison.[5]

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[3]The development of juvenile courts is traced in *In re* Gault, 387 U.S. 1, 14-17 (1967), and in *Task Force on Juvenile Delinquency, the President's Commission on Law Enforcement and Administration of Justice, Juvenile Delinquency and Youth Crime* 1-4 (1967) [hereinafter cited as *Crime Commission Task Force*].

[4]The delinquency petition filed against Joseph McKeiver alleged that he "did, on or about 4/11/68 at or about 1:55 P.M., at or near 3300 W. Diamond Street, rob the complainant, Reggio James (sic), of articles of personal property. The boy is charged with Robbery, Larceny, and Receiving Stolen Goods." (A. v.). The delinquency petition filed against Edward Terry alleged that he "did on or about 8-31-68 at or about 7:05 p.m. in company with others act in a disorderly manner while at or near Parkside and Lindenwood Streets strike Officer Sweeney #456. (sic) The boy is charged with assault and battery on officer and conspiracy." (A. vii).

[5]This is "Pennypack House," a euphemism for a block of cells in the "House of Correction," an adult prison. Juveniles continue to be confined in this prison despite the fact that the length of stay aver-

Defense counsel and the District Attorney bargain for guilty pleas in juvenile court just as they do in adult criminal court.[6] Motions to suppress evidence obtained in violation of the juvenile's fourth, fifth and sixth amendment rights are routinely heard and decided.[7] Each element of the crimes charged must be proved beyond a reasonable doubt in a hearing conforming to the due process mandates of *In re Winship*, 397 U.S. 358 (1970).[8] The usual rules of evidence as to relevancy, materiality, hearsay, and form of questioning are applied. The same common law defenses available in adult criminal proceedings are available in juvenile court. *E.g., In re Winburn*, 32 Wis. 2d 152, 145 N.W.2d 178 (1966) (insanity defense), and *Collins v. State*, 429 S.W.2d 650 (Tex. Civ. App. 1968) (double jeopardy).

Members of the public and press enter the courtroom and the delinquent's arrest and prior record may be reported in the newspapers.[9]

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ages more than a month and despite the recommendation of a University of Pennsylvania study made in 1966, that such commitments immediately stop. *Fels Institute of State and Local Government of the University of Pennsylvania, A Plan for Juvenile Detention Facilities in Philadelphia* (1966) (Report of an official study commissioned by the City of Philadelphia). The practice of confining children in adult prisons is by no means limited to Philadelphia. Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 *Crim. & Delinq.*, 97, 108 (1961).

[6]This bargaining is usually for dropping counts or other delinquency petitions rather than for sentencing recommendations by the district attorney.

[7]Administrative Regulation of the Philadelphia Juvenile Court regarding, *inter alia*, motions to suppress. 161 Philadelphia Legal Intelligencer, Sept. 16, 1969, at 1.

[8]Each element of the criminal offense must be proven because a delinquent child is one who has "violated any law of the Commonwealth. . . ." *Pa. Stat. Ann.* tit. 11, § 243 (1965).

[9]The judges of the Philadelphia Juvenile Court exercise varying degrees of control over admission to the courtroom, but the press is generally admitted, and, on occasion, visiting high school students are

Once the judge finds a juvenile guilty, he may confine him in what amounts to a prison[10] until the juvenile's majority. Pa. Stat. Ann. tit. 11 § 250 (1965); *In re Bethea*, 215 Pa. Super. 75, 257 A.2d 368 (1969). It cannot be emphasized too strongly that when a juvenile stands before a juvenile court in this country he risks commitment, often for a long term, to institutions that are as confining and degrading as adult prisons and which, in Professor Tappan's view, "differ but little in program and correctional impact from the nineteenth-century prison." P. Tappan, Crime, Justice and Correction 649 (1960):[11] The Task Force on Juvenile Delinquency of the President's Crime Commission stated:

> "There are things going on, methods of discipline being used in the State training schools of this coun-

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admitted, presumably for the supposed deterrent value of the experience. The reports of arrests and dispositions which appear in the Philadelphia press may originate with the Philadelphia Police Department, which maintains juvenile records separate from those maintained by the Juvenile Court and not subject to its control. Such practices are not limited to Philadelphia. *In re* Gault, 387 U.S. 1, 24-25 (1967); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 *Colum. L. Rev.* 281, 285-86 (1967); Handler, *The Juvenile Court and the Adversary System*, 1965 *Wis. L. Rev.* 7, 13; The Unfulfilled Promise of the Juvenile Court, supra note 5, at 102-04.

[10] For example, the State Correctional Institution at Camp Hill, to which juveniles from Philadelphia are sometimes sent, is a brick building with barred windows, locked steel doors, a cyclone fence topped with barbed wire and guard towers. It has been described by a former juvenile court judge as "a maximum security prison for adjudged delinquents. . . ." *In re* Bethea, 215 Pa. Super. 75, 76, 257 A.2d 368, 369 (1969) (Hoffman, J.).

[11] *Accord*, Cohen, *The Standard of Proof in Juvenile Proceedings: Gault Beyond a Reasonable Doubt*, 68 *Mich. L. Rev.* 567, 572 n.20 (1970); Comment, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal*, 114 *U. Pa. L. Rev.* 1171, 1215 (1966); *The Juvenile Court and the Adversary System: Problems of Function and Form*, *supra* note 9, at 12-13; *The Unfulfilled Promise of the Juvenile Court*, *supra* note 5, at 107-08.

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> tion of Justice, *Juvenile D*ement and Administra-
> *Crime* 8 (1967) (quoting a *linquency and Youth*
> inafter cited as *Crime Com*leading penologist) [here-
> *mission Task Force*]

Moreover, the stigma that a juve tion—reflected in part by great dnile suffers upon convic-ficulty in securing em-ployment and entering the armed mates that resulting from convictervies—closely approxi-proceeding.[12] on in an adult criminal

The reality of the juvenile cour tem in which a child is charged w process, then, is a sys-same basic rules used in the adultth crime, tried under the convicted, stigmatized like an adu criminal process, and, if in what is equal to or worse t criminal and imprisoned Force on Juvenile Delinquency o an adult jail. The Task mission summarized the juvenile the National Crime Com-

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[12] *In re* Gault, 387 U.S. 1, 24-25 (1
venile Proceedings, supra note 11, at 67); *Standard of Proof in Ju-a Gateway to Rehabilitation in the Ju*3-74; Lipsitt, *Due Process as* ton U. L. Rev. 62, 67-70 (1969); Plat*enile Justice System*, 49 Bos-*Advocacy: Occupational Hazards in* and Friedman, *The Limits of* Rev. 1156, 1160-61 (1968); *Crime C uvenile Court*, 116 *U. Pa. L.* 92-93, 420-21; *Rights and Rehabilit mmission Task Force*, at 39, *supra* note 9, at 286-89; *Criminal O ion in the Juvenile Courts,* *supra* note 11, at 1216-17; Note, *Juv enders in the Juvenile Court:* *State Courts, and Individualized Just ile Delinquents: The Police,* 85, 799-801 (1966); *The Juvenile Co* 79 *Harv. L. Rev.* 775, 784-*supra* note 9, at 13-14; *The Unfulfille rt and the Adversary System,* *supra* note 5, at 102-03; *P. Tappan, Promise of the Juvenile Court,* 392 (1960). *Crime, Justice and Correction*

> tinction often disappears. . . . In theory the court's action was to affix no stigmatizing label. In fact a delinquent is generally viewed by employers, schools, the armed services–by society generally–as a criminal. Crime Commission Task Force, at 9.

In *Duncan v. Louisiana*, 391 U.S. 145 (1968), this Court held that trial by jury was "fundamental" to our system of justice because it gives the accused:

> [A]n inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. 391 U.S. at 156.

The prosecutor and judge have the same roles in determining guilt in the juvenile court that they have in an adult criminal court. The prosecutors and judges in juvenile court are as subject to human failings as their counterparts in the adult criminal court. Fundamental fairness therefore demands that an accused juvenile receive the same safeguard against the possibility of a "corrupt or overzealous prosecutor" and a "compliant, biased, or eccentric judge" as *Duncan* gives to an adult accused.[13]

Indeed, jury trials may be more essential to fundamental fairness in juvenile proceedings than they are to fundamental fairness in adult criminal proceedings, for in juvenile proceedings the state exercises broader discretion about when to arrest,[14] when to prosecute,[15] and the severity of

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[13]The President's Crime Commission reported a recent survey of juvenile court judges that revealed that "half had no undergraduate degree; a fifth had received no college education at all; a fifth were not members of the bar." *The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society* 80 (1967).

[14]*Crime Commission Task Force*, at 12-14. There is no established constitutional requirement limiting the arrest of juveniles to situations in which there is probable cause. Ketcham, *Guidelines from Gault: Revolutionary Requirements and Reappraisal*, 53 *Va.* L. *Rev.* 1700, 1715 (1967).

[15]Both the police and "intake" personnel exercise standardless and unreviewable discretion as to whom to prosecute. *Crime Commission*

the penalty to impose.[16] This discretion has been abused. *In re Gault*, 387 U.S. 1, 24-25 (1967).

But it is not only as a protection against biased, eccentric, or overzealous judges and prosecutors that juries are fundamental to factfinding accuracy. The averaging of life experiences and attitudes, the balancing of biases, and the opportunity for reflection and discussion contribute to more accurate factfinding by a jury than by a single judge.[17] This was early recognized in our legal history:

> The law has established this tribunal because it is believed, that, from its numbers, the mode of their se-

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Task Force, at 12-18, 88, 419-22; Juvenile Delinquents: The Police, State Courts, and Individualized Justice, supra, note 12, at 776-90, 804; Handler and Rosenheim, *Privacy in Welfare: Public Assistance and Juvenile Justice*, 1966 *Law & Contemp. Prob.* 377, 394-400; *The* Juvenile Court and the Adversary System, supra note 9, at 11, 19; Sheridan, *Juvenile Court Intake*, 2 J. *Family Law* 139 (1962). In Pennsylvania, "any citizen" may file a delinquency petition, *Pa. Stat. Ann.* tit. 11, § 246 (1965), but in practice an intake interviewer employed by the Juvenile Court usually makes this decision; the overbroad scope of his discretion to do so is the subject of constitutional attack. Conover v. Montemuro, 304 F. Supp. 259 (E.D. Pa. 1969). In Philadelphia and many other jurisdictions a delinquency petition will invariably be filed if the complainant is insistent. Privacy in Welfare, supra, at 397. Thus, one of the few constraints on the intake interviewer's discretion favors public indignation over the child's best interest.

[16] *Pa. Stat. Ann.* tit. 11, § 250 (1965), gives the court sentencing choices ranging from doing nothing, through probation, and including commitment to a state correctional institution.

[17] The contribution of this aspect of the jury to factfinding accuracy has been recognized by this Court in its decisions seeking to ensure fair representation on the jury. *E.g.*, Witherspoon v. Illinois, 391 U.S. 510 (1968); Hernandez v. Texas, 347 U.S. 475 (1954); Norris v. Alabama, 294 U.S. 587 (1935). This becomes especially important when provision of jury trials entails inclusion of factfinders familiar with the Negro poverty subculture from which come most juvenile delinquents in urban areas and in the context of which are found the events and witnesses.

> lection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of a circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. *People v. Garbutt*, 17 Mich. 9, 27 (1868)

The right to jury trial avoids other threats to factfinding accuracy posed by a judge sitting as the sole trier of fact: the influence of inadmissible and prejudicial evidence, the uncritical acceptance of the testimony of witnesses who become known to the judge through regular appearances, and the consideration during the adjudicatory hearing of the probation department report on the juvenile's record and social history.[18]

In *Duncan* this Court noted that one of the functions of a jury was to give an adult

> the common-sense judgment of a jury [in preference] to the more tutored but perhaps less sympathetic reaction of the single judge. . . . *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

The juvenile court process approximates a penal system because it adjudicates whether or not a crime has been committed and may order incarceration upon an affirmative adjudication. The President's Crime Commission concluded:

> [I]t has become clear that in fact the same purposes that characterize the use of criminal law for adult offenders—retribution, condemnation, deterrence, incapacitation—are involved in the disposition of juvenile offenders too. *The Challenge of Crime in a Free Society*, supra note 13, at 80.

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[18]In the court below, the Commonwealth argued that juries would not contribute to factfinding accuracy. This argument quarrels with the wisdom of the suppositions underlying the sixth amendment's guarantee of the right to trial by jury, and it therefore has been answered by the Court's decision in Duncan v. Louisiana, 391 U.S. 145 (1968).

It is therefore equally essential to fundamental fairness in delinquency proceedings that a juvenile be able to avail himself of the protection of a jury for a more "sympathetic" and less "tutored" reaction than that of a judge.

In *In re Winship*, 397 U.S. 358 (1970), this Court held that due process requires that the standard of proof for adjudication of juvenile delinquency upon charges of commission of a crime be proof beyond a reasonable doubt of every element of the crime. This holding followed from the Court's conclusion that only proof beyond a reasonable doubt assured that convictions would be based upon the high degree of factfinding accuracy which this Court found essential to fundamental fairness in both juvenile and adult proceedings. It has been demonstrated empirically that juries are more likely than judges to acquit upon reasonable doubt. H. Kalven and H. Zeisel, *American Jury* 187 (1966). This apparently reflects the common sense observation that when the facts are in doubt, it is more difficult to get agreement from several minds than from one. Professors Kalven and Zeisel have said:

> If a society wishes to be serious about convicting only when the state has been put to proof beyond a reasonable doubt, it would be well advised to have a jury system. *American Jury*, supra, at 189-90.

Jury trials are as necessary as the reasonable doubt standard to the fundamental value our society places upon protecting the innocent against conviction. Thus, the same principle which underlies this Court's holding in *Winship* dictates granting the right to jury trial, for trial by jury is, equally with proof beyond a reasonable doubt, "a prime instrument for reducing the risk of convictions resting on factual error." 397 U.S. at 363.

The court below sought to avoid the impact on juvenile delinquency proceedings of *Duncan v. Louisiana*, 391 U.S. 145 (1968), by pointing to this Court's dictum that:

> A criminal process which was fair and equitable but used no juries is easy to imagine. It would make

> use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. 391 U.S. at 150 n. 14.

The Commonwealth claims that the juvenile court process is such an alternative imaginable system. But this Court recently observed that:

> [T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility which results from that group's determination of guilt or innocence. *Williams v. Florida*, 90 S. Ct. 1893 (1970).

A judge sitting as the sole trier of fact is not a safeguard against biased, overzealous, corrupt or eccentric prosecutors or judges; he cannot substitute for the more sympathetic reaction of representatives of the community; he cannot offer the factfinding accuracy of a balancing of personalities and an opportunity for discussion. Clearly, a juvenile court without a jury is not the "fair and equitable" system to which the Court made abstract reference in *Duncan*.[19]

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[19] Because appellants were charged with serious crimes and were exposed to the risk of confinement for up to six years, there is no doubt that they were charged with serious offenses within the meaning of Duncan v. Louisiana, 391 U.S. 145 (1968). The Commonwealth apparently does not deny that appellants would be entitled to a jury trial if this Court should hold that *Duncan* applies to juvenile delinquency proceedings. Appellants contend that the relevant criterion of whether juveniles charged with delinquency must be afforded the right to jury trial is the duration of incarceration to which the juvenile may be subject, and that where that exposure is greater than six months, the right to jury trial must be afforded. Duncan v. Louisiana, 391 U.S. 145 (1968); Bloom v. Illinois, 391 U.S. 194 (1968); Baldwin v. New York, 90 S. Ct. 1886 (1970).

II. THE REHABILITATIVE CAPABILITIES OF THE JUVENILE COURT WILL NOT BE COMPROMISED BY JURY TRIALS.

Appellants have demonstrated that the process by which juvenile delinquency is adjudicated and dealt with is essentially a system in which juveniles are charged with commissions of crime, are tried in the same type of factfinding process as adult criminals, and are liable, upon conviction, to incarceration in correctional institutions that are as bad as or worse than adult prisons. This demonstration, in appellants' view, brings juvenile delinquency proceedings within the ambit of the "criminal prosecutions" for which the sixth amendment (applicable to state prosecutions after *Duncan*) guarantees the right to trial by jury.[20] "The balancing of the rehabilitative purpose of the juvenile proceeding with the due process requirement of a jury trial is a matter for a future Constitutional Convention." *DeBacker v. Brainard*, 396 U.S. 28, 38 (1969) (Douglas, J., dissenting). If, despite the essentially penal character of the juvenile court system, the rehabilitative purpose of the juvenile court is to be invoked to deny a right found fundamentally necessary in *Duncan*, there must be a clear demonstration—not merely assertion or conjecture—that the juvenile court system is in fact rehabilitative and that jury trials would substantially interfere in rehabilitation. No such demonstration can be made.

A. The Rehabilitative Functions of the Juvenile Court Will Not Be Harmed by Jury Trials in the Adjudicatory Hearing.

The argument that jury trials will interfere with rehabilitation is based upon a fundamental misunderstanding of the

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[20]The argument that the goal of rehabilitation justifies a lesser standard of due process for juveniles than for adult criminals is made further dubious by the fact that rehabilitation is also one of the stated goals of the adult criminal system. *See, e.g.*, State v. Arenas, ____ Ore. ____, ____, 453 P.2d 915, 918 (1969).

juvenile court process. The juvenile court's function is seperated into factfinding, which occurs at the adjudicatory hearing, and rehabilitation, which occurs outside of the adjudicatory hearing. Jury trials, which affect only the adjudicatory hearing, could not possibly interfere with the juvenile court's efforts at rehabilitation because rehabilitation does not take place at the adjudicatory hearing. Thus, Dean Monrad Paulsen, a leading scholar of juvenile court law, has said:

> Certainly, too, the reformers were mistaken about the opportunity for treatment presented by a few minutes in court. Not many today would agree that a judge who puts his arm around a boy gains "immensely in the effectiveness of his work." If our methods work changes in the characters of delinquent children, they must embrace more sustained measures over a period of time. Paulsen, Kent v. United States: The Constitutional Context of Juvenile Cases, 1966 *Sup. Ct. Rev.* 167, 186.

The argument against granting jury trials and other due process rights for juveniles is sometimes stated in terms of "formality." Trial by jury, it is argued, will introduce "formality" into delinquency proceedings, and "formality" is said to be detrimental to rehabilitation.[21] The argument is based upon a false premise. Trial by jury will introduce "formality" into only the adjudicatory hearing, the stage at which rehabilitation does not occur. Moreover, there is substantial support for the view that increased formality in the adjudicatory hearing has a positive effect on subsequent ef-

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[21] This view was taken by the Task Force on Juvenile Delinquency of the President's Commission on Law Enforcement and the Administration of Justice. *Crime Commission Task Force* at 38. The Commonwealth placed much reliance on this in the court below. However, the statement, made prior to *In re* Gault, 387 U.S. 1 (1967), is based upon the opinion in 1957 of Dean Monrad Paulsen, who subsequently changed his mind. *Compare* Paulsen, *Fairness to the Juvenile Offender,* 41 *Minn.* L. *Rev.* 547, 559 (1957), *with* Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases,* 1966 *Sup. Ct. Rev.* 167, 186

forts at rehabilitation.[22] Dorsen and Rezneck have suggested that jury trials in particular would have a positive therapeutic effect:

> [T]rial by jury is not a matter of form—like a judge's robe or gavel—but of substance, the product of long historical experience and expressing a profound judgment by our legal system about the means of adjudicating criminal behavior. If it thereby introduces an aura of formality or solemnity, it is formality desirable in a matter of such consequence. Further, we submit that such formality is more likely to infuse a juvenile with respect for the legal system than to heighten his feelings of alienation and in that sense may ultimately be therapeutic. Dorsen and Rezneck, In re Gault and the Future of Juvenile Law, *1 Fam. L.Q.*, December 1967, 1, 23.

Finally, it is significant that eleven states[23] and England,[24] whose juvenile court processes are based upon the

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[22] *In re* Gault, 387 U.S. 1, 26 (1967); Ketcham, *The Need for Law and Order in the Juvenile Court: Some Unanswered Questions*, 20 J. *Legal Ed.* 578, 581-82 (1968); *Crime Commission Task Force* at 421; *Rights and Rehabilitation in the Juvenile Courts, supra* note 9, at 284-85; *The Challenge of Crime in a Free Society, supra* note 13, at 85; *Juvenile Delinquents; The Police, State Courts, and Individualized Justice, supra* note 12, at 791-92; *The Juvenile Court and the Adversary System, supra* note 9, at 19-20.

[23] *Colo. Rev. Stat. Ann.* § 37-19-24 (1965 Perm. Cum. Supp.); *Kan. Stat. Ann.* § 38-808 (Supp. 1969); *Mass. Ann. Laws* ch. 119, § 56 (1965) (Child adjudged delinquent may appeal as of right to Superior Court where he may have a jury trial upon demand); *Mich. Comp. Laws Ann.* § 712A.17 (1968); *Mont. Rev. Codes Ann.* § 10-604.1 (Supp. 1969); *Okla. Stat. Ann.* tit. 10, § 1110 (Supp.1969); *S.D. Comp. Laws Ann.* § 26-8-31 (1967); *Tex. Rev. Civ. Stat. Ann.* art 2338-1, § 13(b) (Supp. 1969); *W. Va. Code Ann.* § 49-5-6 (1966); *Wis. Stat. Ann.* § 48.25(2) (1957); *Wyo. Stat. Ann.* § 14-108(c) (1957).

[24] Magistrates' Courts Act of 1952, 15 & 16 Geo. 6 & 1 Eliz. 2,c. 55, § 20 (For juveniles over fourteen years of age charged with indictable offenses).

goal of rehabilitation, have by statute granted juveniles the right to trial by jury. These jurisdictions have apparently concluded that jury trials at the adjudicatory hearing do not interfere with efforts at rehabilitation at other stages of the juvenile court process.

B. The Juvenile Court Has Not And Cannot Accomplish Its Rehabilitative Goal.

Appellants have demonstrated that granting the right to jury trials in juvenile delinquency proceedings will not interfere with the juvenile court's efforts at rehabilitation. Pursuit of the balancing of the fundamental right to jury trial against the asserted rehabilitative goal of the juvenile court requires, as this Court made clear in *Gault*, an appraisal of the juvenile court's accomplishments, not its promises, pretensions, or hopes.

The evidence that the juvenile court does not rehabilitate is overwhelming.

This Court recognized in *Gault* and *Winship* that the rehabilitative mission of juvenile courts has been largely unsuccessful. The President's Crime Commission concluded:

> Studies conducted by the Commission, legislative inquiries in various States, and reports by informed observers compel the conclusion that the great hopes originally held for the juvenile court have not been fulfilled. It has not succeeded significantly in rehabilitating delinquent youth, in reducing or even stemming the tide of delinquency, or in bringing justice and compassion to the child offender. The *Challenge of Crime in a Free Society*, supra note 13, at 80.

This view is widely supported.[25] That the juvenile court has not succeeded at rehabilitation has received striking ob-

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[25] *The Standard of Proof in Juvenile Proceedings, supra* note 11, at 572-73; *H. James, Children in Trouble: A National Scandal* 17-43

jective confirmation from a study made in Philadelphia by Professors Thorsten Sellin and Marvin Wolfgang of the University of Pennsylvania.[26] The study, undertaken for the National Institute of Mental Health, was based upon analysis of the history of 9,945 male subjects born in 1945:

> It appears that the criminal justice system has been able to isolate the hard core offender fairly well. Unfortunately, the product of this encounter with sanctioning authorities is far from desirable. Not only do a greater number of those who receive punitive treatment (institutionalization, fine, or probation) continue to violate the law, but they also commit more serious crimes with greater rapidity than those who experience a less intimate contact with the judicial and correctional systems. Thus we must conclude that the juvenile justice system at its best, has no effect on the subsequent criminal behavior of adolescent boys and at its worst, has a deleterious effect on future behavior.[27]

The facts of the instant case illustrate one of the reasons why the juvenile court has been so unsuccessful at rehabilitation. At the dispositional hearing following the adjudication of delinquency in Joseph McKeiver's trial, the court's inquiry into McKeiver's personality and into the possible dispositional alternatives consisted of little more than the judge observing that Mrs. McKeiver did not have "the kind

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(1969); *The Limits of Advocacy, supra* note 12, at 1160; *The Need for Law and Order in the Juvenile Court, supra* note 22, at 578-80; *Crime Commission Task Force*, at 6-9; 93-95; *F. Allen, The Borderland of Criminal Justice* 43-61 (1964).

[26] *T. Sellin and M. Wolfgang, Delinquency in a Birth Cohort*, Center for Studies in Criminology and Criminal Law of the University of Pennsylvania (Mimeo 1970)(Available upon request from Dr. Saleem) Shah, Chief, Center for Studies in Crime and Delinquency, National Institute of Mental Health)

[27] *Id.* at Chapter XIV, 13-14.

of home that is conducive to raising good, healthy children" (A. 17); that having children by a paramour was reflected in her "57 percent" "batting average" in juvenile court (A. 17); and that "[t]here must have been a problem in school." (A. 17). In the dispositional hearing of Edward Terry, a different juvenile judge told Terry that he was a "healthy, good looking boy," but his "activity" was "inexcusable" and was helping to "drive this city [Philadelphia] further down." (A. 32). Such observations are hardly a serious or scientific effort to understand McKeiver or Terry or to set in motion a constructive process of rehabilitation.

The court below, while conceding that the juvenile court "has in many respects fallen far short of its goals," 438 Pa. at 349, 265 A.2d at 355, was "not yet convinced that the current practices do not contain the seeds from which a truly appropriate system can be brought forth." 438 Pa. at 349-50, 265 A.2d at 355.

The President's Crime Commission was much more pessimistic:

> But it is by no means true that a simple infusion of resources into juvenile courts and attendant institutions would fulfill the expectations that accompanied the court's birth and development. There are problems that go much deeper. The failure of the juvenile court to fulfill its rehabilitative and preventive promise stems in important measure from a grossly over-optimistic view of what is known about the phenomenon of juvenile criminality and of what even a fully equipped juvenile court could do about it. Experts in the field agree that it is extremely difficult to develop successful methods for preventing serious delinquent acts through rehabilitative programs for the child. What research is making increasingly clear is that delinquency is not so much an act of individual deviancy as a pattern of behavior produced by a multitude of pervasive societal influences well beyond the reach of the actions of

any judge, probation officer, correctional counselor, or psychiatrist.

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The limitations, both in theory and in execution, of strictly rehabilitative treatment methods combined with public anxiety over the seemingly irresistible rise in juvenile criminality, have produced a rupture between the theory and the practice of juvenile court dispositions. While statutes, judges, and commentators still talk the language of compassion and treatment, it has become clear that in fact the same purposes that characterize the use of the criminal law for adult offenders—retribution, condemnation, deterrence, incapacitation—are involved in the disposition of juvenile offenders too. These are society's ultimate techniques for protection against threatening conduct; it is inevitable that they should be used against threats from the young as well as the old when other resources appear unavailing. *The Challenge of Crime in a Free Society*, supra note 13, at 80.

C. Trial By Jury Will Not Impose An Undue Administrative Burden On Juvenile Courts Nor Delay Disposition Adversely To Rehabilitation.

It has been suggested that trial by jury will heavily burden juvenile courts. The twelve jurisdictions that grant jury trials by statute have found the burden manageable despite the fact that several of them contain large metropolitan areas with heavy case volumes.[28] The fact is that very few jury trials are requested, even when the right is

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[28] Denver, Colo., pop. 493,887; Detroit, Michigan, pop. 1,670,144; Houston, Texas, pop. 938,219; Milwaukee, Wis., pop. 741,324. *U.S. Department of Commerce, Statistical Abstract of the United States* 21-22 (1969) (1960 census data).

freely available.[29] Moreover, this Court has often made clear that the burden (and therefore expense) of affording a constitutional right is not a basis for denying recognition to the right. E.g., *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). As Justice Black has said:

> Cheap, easy convictions were not the primary concern of those who adopted the Constitution and the Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the Government to convict those it accused of crimes. On their scale of values justice occupied at least as high a position as economy. *Green v. United States*, 356 U.S., 165, 216 (1958) (dissenting opinion)

The Commonwealth also argued in the court below that the availability of jury trials would permit defense counsel to delay adjudication and disposition by waiting until the eve of trial to demand a jury, with adverse consequences upon rehabilitation. There is no objection, constitutional or otherwise, to conditioning the exercise of the right to a jury trial so as to avoid delay created by last minute demands. Moreover, as has already been demonstrated, juvenile courts carry out little or no rehabilitation with which such delay could interfere.

It may be that in practice jury trials will introduce some delay into adjudicatory hearings; if so, such delay will be salutory. Students of the juvenile court have critically noted the rapid, assembly line quality of proceedings in juvenile courts, especially in large cities.[30] In Los Angeles, for example, hearings averaged three minutes.[31] Counsel

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[29] Dorsen and Rezneck, *In re Gault and the Future of Juvenile Law*, *1 Fam. L.Q.*, Dec. 1967, 1, 24; *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, *supra* note 12, at 793-94.

[30] *Crime Commission Task Force* at 94; *The Juvenile Court and the Adversary System*, *supra* note 9, at 12, 17.

[31] *Crime Commission Task Force* at 94.

for McKeiver was required by the court to proceed despite the fact that he had never before interviewed his client. (A. 1). And the transcripts in the instant case indicate that it took no more than fifteen minutes to hear, convict and dispose of each appellant. (A. 1-32). Surely, the more measured pace of a jury trial is appropriate when children may be stigmatized with conviction for serious crimes and face institutionalization for years.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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